

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 21, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP1032-CR**

**Cir. Ct. No. 2013CF132**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WALTER L. STEINHARDT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Walter Steinhardt appeals from a judgment convicting him of incest and first-degree sexual assault of a person under thirteen years old. Steinhardt also appeals from an order denying his postconviction motion. We affirm the judgment and the order.

¶2 A jury convicted Steinhardt of first-degree sexual assault and incest. Postconviction, Steinhardt challenged an evidentiary ruling of the circuit court, argued that the evidence was insufficient to convict him of first-degree sexual assault and incest, and that the circuit court misused its sentencing discretion. The circuit court denied the postconviction motion. Steinhardt appeals.

¶3 We address the evidentiary ruling first. At trial, the victim and the victim's mother testified that Steinhardt sexually touched and penetrated the victim.<sup>1</sup> The mother testified that she observed Steinhardt assault the victim. During the mother's cross-examination, Steinhardt attempted to question her about photographs found on her cell phone and a text message she received expressing an interest in a sexual encounter with her that would be witnessed by one of her children (collectively, the cell phone evidence).<sup>2</sup> The State objected to the cell phone evidence as not relevant and extremely prejudicial. Steinhardt countered that the evidence was offered to show that the mother had entertained the notion of a sexual encounter witnessed by one of her children,<sup>3</sup> and that this notion did not originate with Steinhardt's assault of the child. Steinhardt also argued that the evidence shed light on the mother's credibility. The State responded that the mother did not attribute to Steinhardt the notion of a child-witnessed sexual encounter and that the text, from an unknown party, had little to no probative value. The circuit court ruled that the text and photographs were not very

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<sup>1</sup> Steinhardt was also tried on a charge of child enticement, but the jury acquitted him of that charge.

<sup>2</sup> At the postconviction motion hearing, the record was clarified to establish that the photographs were of the mother and were described by the State as "pretty graphic."

<sup>3</sup> In contrast to the scenario allegedly suggested by the text message, under the facts of this case, the mother witnessed the sexual assault of her child.

probative and highly prejudicial. The court found that the cell phone evidence was “designed to smear [the mother] more than it is to shine any light on what’s happened here.”

¶4 On appeal, Steinhardt argues that the cell phone evidence was relevant and not unfairly prejudicial.<sup>4</sup>

¶5 Decisions to admit or exclude evidence are with the circuit court’s discretion, and we will affirm if the circuit court properly exercised its discretion. *State v. Hunt*, 2014 WI 102, ¶20, 360 Wis. 2d 576, 851 N.W.2d 434. A circuit court misuses its discretion when “it applies an improper legal standard or makes a decision not reasonably supported by the facts of record.” *Id.* (citation omitted).

¶6 Relevant evidence has a “tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” WIS. STAT. § 904.01 (2013-14).<sup>5</sup> Relevant evidence may nevertheless “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” WIS. STAT. § 904.03. A circuit court has broad discretion to apply this balancing test. *Nowatske v. Osterloh*, 201 Wis. 2d 497, 503, 549 N.W.2d 256 (Ct. App. 1996).

¶7 Steinhardt offered the cell phone evidence to undermine the mother’s credibility. Such evidence must, as a threshold matter, tend to affect the witness’s credibility. *See id.* at 503-06. Here, the cell phone evidence did not have a logical or

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<sup>4</sup> To the extent the excluded cell phone evidence related to the child enticement charge of which Steinhardt was acquitted, the evidentiary ruling is no longer of any consequence.

<sup>5</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

rational connection to the mother's credibility. The mother testified about Steinhardt's assault of the child and her own role in facilitating that assault. The cell phone evidence did not undermine this testimony. We further agree with the circuit court that the cell phone evidence was not relevant because it bore no relation to the facts of the case and did not shed any light on any issue of consequence to the case. Finally, we agree that the evidence was unfairly prejudicial because it was offered to "smear" the mother, would have tended to "influence the outcome by improper means" or "appeal[] to the jury's sympathies, arouse[] its sense of horror, provoke[] its instinct to punish or otherwise cause[] a jury to base its decision on something other than the established propositions in the case." *State v. Sullivan*, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998). We affirm the circuit court's application of the balance test and its ruling excluding the cell phone evidence.

¶8 Steinhardt next argues that the evidence was insufficient to establish that he had sexual contact with the victim for the first-degree sexual assault charge and that he had intercourse with the victim for the incest charge. We review the sufficiency of the evidence to determine whether "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Ray*, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992) (citation omitted).

¶9 Steinhardt concedes in his reply brief that the victim and the mother consistently testified that a sexual assault occurred, even if their testimony varied as to some of the details of the assault. It was the jury's function to assess credibility, weigh the evidence and resolve conflicts in the testimony. *State v. Poellinger*, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). If more than one

inference was possible from the evidence, we must accept the inference drawn by the jury. *Id.* The testimony of the victim and the mother was sufficient to convict Steinhardt of first-degree sexual assault (the victim was under thirteen when Steinhardt sexually assaulted the victim) and incest (Steinhardt had intercourse with the victim and Steinhardt had the requisite status in relation to the victim). The jury was entitled to find the testimony of the victim and the mother<sup>6</sup> credible. As the circuit court noted at the postconviction motion hearing, the jury acquitted Steinhardt of child enticement arising out of the same incident in which he was convicted of the other crimes.

¶10 Finally, Steinhardt challenges the circuit court's exercise of sentencing discretion. At sentencing, the circuit court reviewed the presentence investigation report. The court indicated that it would consider the gravity of the offenses, Steinhardt's character, the need to protect the public and deter others from similar conduct, and the need to send a message to the community that the crimes were serious and warranted significant sentences. The court found that Steinhardt breached the victim's trust in the most serious way possible. The court considered Steinhardt's age, character, employment history, alcohol use, and that these offenses appeared to be his first offenses. The court considered the credibility of the witnesses and had no doubt that Steinhardt committed the crimes of conviction. For the first-degree sexual assault conviction, the court sentenced Steinhardt to thirty-five years (twenty-five years of initial confinement and ten years of extended supervision). For the incest conviction, the court sentenced

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<sup>6</sup> The mother, who was subject to criminal charges in connection with Steinhardt's crimes, testified against her penal interest in Steinhardt's case. This enhanced her credibility. *See State v. Scott*, 2000 WI App 51, ¶26, 234 Wis. 2d 129, 608 N.W.2d 753.

Steinhardt to twenty years (ten years of initial confinement and ten years of extended supervision), to be served consecutively to the first-degree sexual assault sentence.

¶11 At the postconviction motion hearing, the circuit court rejected Steinhardt's challenge to his sentences. The court stated that it was aware of Steinhardt's substance abuse issues and any factors that might have been deemed mitigating (work and military service history). However, the crimes were serious and required sentences that would punish Steinhardt and deter others from engaging in such conduct. The court intended to impose harsh sentences and remove Steinhardt from the community to protect the public.

¶12 On appeal, Steinhardt argues that the circuit court misused its sentencing discretion. We disagree. The record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Steinhardt. The weight to be given to those factors was for the sentencing court to decide. *State v. Steele*, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112. In fashioning the sentences, the court considered the seriousness of the offenses, Steinhardt's character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76.

¶13 Steinhardt argues that the circuit court should have placed greater weight on other sentencing considerations, including his lack of prior criminal history and the lesser sentences recommended in the presentence investigation report. Steinhardt, who exploited a trust relationship with a child to gratify himself sexually, cites as mitigating that he did not use force against the victim

and that he ceased his assault when the victim asked him to stop. As discussed above, the circuit court had the discretion to give these considerations the weight they deserve.

¶14 We conclude that the sentencing court exercised its discretion “to create a sentence within the range provided by the legislature which reflects the circumstances of the situation and the particular characteristics of the offender.” *Steele*, 246 Wis.2d 744, ¶9. The sentences are not disproportionate to the offenses committed, were well within the maximum possible sentences,<sup>7</sup> and were not excessive. *State v. Mursal*, 2013 WI App 125, ¶24, 351 Wis. 2d 180, 839 N.W.2d 173. The circuit court did not misuse its sentencing discretion.

¶15 To the extent Steinhardt argues that the circuit court should have placed greater weight on the presentence investigation report’s sentencing recommendation, we note that we review the circuit court’s sentencing discretion, not the presentence investigation report author’s recommendations. *State v. Miller*, 180 Wis. 2d 320, 325-26, 509 N.W.2d 98 (Ct. App. 1993). As part of an otherwise proper exercise of sentencing discretion, the sentencing court need not explain its deviation from the presentence investigation report’s recommendation. *State v. Johnson*, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990).

*By the Court.*—Judgment and order affirmed.

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<sup>7</sup> The first-degree sexual assault conviction carried a maximum penalty of sixty years; Steinhardt received thirty-five years. WIS. STAT. §§ 948.02(1)(e) and 939.50(3)(b) (2013-14). The incest conviction carried a maximum penalty of forty years; Steinhardt received twenty years. WIS. STAT. § 948.06 and 939.50(3)(c).

This opinion will not be published. See WIS. STAT. RULE  
809.23(1)(b)5. (2013-14).

